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11
12 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

13 FRIENDS OF MAHA‘ULEPU, INC., a
Hawai‘i non-profit corporation,
14
Plaintiff,

15 v.

16 HAWAI‘I DAIRY FARMS, LLC, a
Delaware Limited Liability Company;
17 ULUPONO INITIATIVE, LLC; a
Delaware Limited Liability Company;
18 MAHA‘ULEPU FARM, LLC; a
Delaware Limited Liability Company,
19
Defendants.

Case No. _____

COMPLAINT; EXHIBIT “A”;
SUMMONS

1 **COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF,**
2 **AND CIVIL PENALTIES**

3 **INTRODUCTION**

4 1. This is a citizen suit for declaratory relief, injunctive relief, and civil
5 penalties brought by Plaintiff Friends of Māhā‘ulepu, Inc., against Defendants
6 Hawai‘i Dairy Farms, LLC, Ulupono Initiative, LLC, and Māhā‘ulepu Farm, LLC,
7 (hereinafter collectively referred to as “Defendants”) for violations of the Federal
8 Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. § 1251
9 *et seq.* (hereinafter “CWA”), at the site of Defendants’ proposed commercial dairy
10 facility (hereinafter “Proposed Dairy Site” or “Site”) located in the Māhā‘ulepu
11 Valley, Kaua‘i.

12 2. This civil action is brought pursuant to the citizen suit provision of the
13 CWA, 33 U.S.C. § 1365(a)(1)(A).

14 3. Section 301(a) of the CWA provides that “the discharge of any pollutant by
15 any person shall be unlawful,” except in accordance with certain statutory
16 requirements of the Act, including the requirement that a discharger obtain and
17 comply with a National Pollutant Discharge Elimination System (“NPDES”)
18 permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342.

19 4. Section 402 of the CWA establishes the NPDES Program, which controls
20 water pollution by regulating point sources and industrial, municipal, and other
 facilities that discharge to surface waters. 33 U.S.C. § 1342.

1 5. As detailed below, Plaintiff alleges that Defendants have violated and
2 continue to violate Sections 301 and 402 of the CWA by engaging in construction
3 and construction support activities at the Site which result in the disturbance of
4 land area totaling one acre or more, or which disturb less than one acre of land area
5 as part of a common plan of development, without first obtaining coverage under
6 Hawai'i's "NPDES General Permit Authorizing Discharges of Storm Water
7 Associated with Construction Activities", Hawai'i Administrative Rules ("HAR")
8 § 11-55, Appendix C, or obtaining coverage under an applicable individual
9 stormwater permit. HAR Ch. 11-55, Appendix C, Section 1.1.

10 6. Upon information and belief, Defendants' unpermitted construction and
11 construction support activities cause or are reasonably likely to cause discharges of
12 pollutants including, but not limited to, dirt, debris, sewage sludge from land
13 applications, biological materials, rock, sand, or other materials (collectively,
14 hereinafter "Construction Pollutants") into waters of the United States, including,
15 but not limited to, the Wai'opili Stream, the Pacific Ocean, and other springs,
16 streams, irrigation, and drainage canals flowing in and through the Proposed Dairy
17 Site.

18 7. Plaintiff seeks declaratory relief establishing that Defendants have violated
19 the CWA. Plaintiff also seeks injunctive relief directing Defendants to halt any
20 and all continuing construction and construction support activities at the Proposed

1 Dairy Site. Additionally, Plaintiff seeks an award of civil penalties in the amount
2 of \$37,500 per violation, per day. Finally, Plaintiff requests that the Court award
3 Plaintiff's reasonable attorneys' and expert witness fees and costs incurred in
4 bringing this action and any other relief that this Court deems appropriate.

5 **JURISDICTION**

6 8. This is a civil enforcement action brought under the citizen suit provisions of
7 Section 505 of the CWA, 33 U.S.C. § 1365. This Court has subject matter
8 jurisdiction pursuant to 33 U.S.C. § 1365(a)(1).

9 9. The Court also has federal question jurisdiction pursuant to 28 U.S.C. §
10 1331 because this action arises under the Clean Water Act and the Declaratory
11 Judgment Act, 28 U.S.C. § 2201, *et seq.*

12 10. On March 11, 2015, Friends of Māhā'ulepu gave notice of the alleged
13 violations and its intent to file suit to Defendants, Defendants' registered agents,
14 the United States Environmental Protection Agency (EPA), EPA Region IX, and
15 the State of Hawai'i, Department of Health, as required by Section 505(a)(1) of the
16 CWA, 33 U.S.C. § 1365(a)(1) and the implementing regulations at 40 C.F.R. §
17 135.2. A true and correct copy of Friends of Māhā'ulepu's notice letter is attached
18 hereto as Exhibit "A".

19 11. More than 60 days have passed since Defendants were served with the
20 notice letter, and, upon information and belief, the violations complained of in the

1 notice are continuing at this time or are reasonably likely to continue. Neither the
2 EPA nor the State of Hawai‘i has commenced or is diligently prosecuting a civil or
3 criminal action to redress the violations alleged in this complaint. 33 U.S.C. §
4 1365(b)(1)(B).

5 VENUE

6 12. Venue properly vests in the U.S. District Court for the District of Hawai‘i
7 pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the
8 source of the alleged violations is located within this judicial district.

9 PARTIES

10 13. Plaintiff Friends of Māhā‘ulepu, Inc., is a nonprofit corporation formed
11 under the laws of the State of Hawai‘i. Friends of Māhā‘ulepu is a group of
12 concerned citizens who reside both within and outside of the Māhā‘ulepu area and
13 the island of Kaua‘i. Friends of Māhā‘ulepu is dedicated to protecting and
14 preserving the natural beauty, land, and water of the Māhā‘ulepu Valley and Island
15 of Kaua‘i, and to ensuring the health and safety of individuals and families who
16 reside, work, or visit spaces in the Māhā‘ulepu Valley and Island of Kaua‘i.
17 Friends of Māhā‘ulepu educates Māhā‘ulepu -area residents and visitors to the
18 Island about possible health threats and risks posed by industrial activities and
19 pollution sources, and advocates on behalf of a clean and safe environment.

20 14. Friends of Māhā‘ulepu’s members use and enjoy waterways in and around

1 Māhā'ulepu for cultural, recreational, and aesthetic purposes, including but not
2 limited to:

- 3 a. sustenance fishing, limu and 'opihi gathering, spring water collection
4 and medicinal plant gathering;
- 5 b. wildlife care, preservation, and observation, including activities
6 related to the preservation of the monk seal;
- 7 c. canoeing, surfing, kite surfing, stand-up paddleboarding, wading,
8 swimming, snorkeling, and other outdoor recreation.

9 15. Waterways used and enjoyed by Friends of Māhā'ulepu for the above
10 activities include, but are not limited to, the Wai'opili Stream, Pacific Ocean, and
11 other hydrologically connected waters. The Māhā'ulepu Valley also is historically
12 and culturally significant for many of Friends of Māhā'ulepu's members, including
13 Native Hawaiians and other longtime Kaua'i residents. Accordingly, Friends of
14 Māhā'ulepu is interested in preserving the integrity of the Māhā'ulepu area,
15 including its waterways, for current and future generations of native Hawaiians and
16 for those persons for whom the Māhā'ulepu Valley holds particular cultural
17 importance.

18 16. Friends of Māhā'ulepu, Inc. is a "person" within the meaning of Section
19 502(5) of the CWA, 33 U.S.C. § 1362(5).

20 17. Upon information and belief, Hawaii Dairy Farms, LLC, is a limited liability

1 company organized under the laws of the State of Delaware, with a mailing
2 address of 737 Bishop St., Ste. 2360, Honolulu, HI, 96813. Hawaii Dairy Farms
3 plans to construct and is constructing a commercial dairy farm at the Proposed
4 Dairy Site, which will house up to 2,000 dairy cows at full operational capacity.

5 18. Upon information and belief, Ulupono Initiative, LLC, is a limited liability
6 company organized under the laws of the State of Delaware, with a mailing
7 address of 999 Bishop St., Ste. 1202, Honolulu, HI, 96813. Ulupono Initiative is
8 the managing member of Hawai'i Dairy Farms, LLC.

9 19. Upon information and belief, Māhā'ulepu Farm, LLC is a limited liability
10 company organized under the laws of the State of Delaware, with a mailing
11 address of 3-1850 Kaumualii Hwy, Lihue, HI, 96766. Māhā'ulepu Farm, LLC
12 owns properties bearing tax map key numbers: (4) 29-003-001, (4) 29-003-006,
13 and (4) 29-001-001, on which the Proposed Dairy is planned, and No. (4) 29-003-
14 005, adjacent to the Proposed Dairy Site.

15 20. Hawai'i Dairy Farms, LLC is a "person" within the meaning of Section
16 502(5) of the CWA, 33 U.S.C. § 1362(5).

17 21. Ulupono Initiative, LLC, is a "person" within the meaning of Section 502(5)
18 of the CWA, 33 U.S.C. § 1362(5).

19 22. Māhā'ulepu Farm, LLC is a "person" within the meaning of Section 502(5)
20 of the CWA, 33 U.S.C. § 1362(5).

STATUTORY AND REGULATORY FRAMEWORK

23. The stated objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

Congressional intent was that the discharge of pollutants into the Nation’s waters be eliminated by 1985. *Id.*

24. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into the waters of the United States, unless the discharge complies with various other enumerated sections of the Act. Section 301(a) prohibits discharges not authorized by, or in violation of, the terms of a valid NPDES permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

25. Section 402 of the CWA establishes the NPDES program, and requires NPDES permit coverage for any stormwater discharge where “the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” 33 U.S.C. § 1342(p)(2)(E). “Storm water” means storm water runoff, snow melt runoff, and surface runoff and drainage. 40 C.F.R. § 122.26(b)(13); HAR § 11-55-01.

26. Section 402 of the CWA provides that “compliance with a permit issued pursuant to this section shall be deemed compliance...with section[] 1311...of this title.” 33 U.S.C. § 1342(k).

1 27. EPA has delegated the administration of the NPDES permit program in
2 Hawai‘i to the Department of Health. Specifically, the Clean Water Branch of the
3 Department of Health administers the NPDES permit program for discharges of
4 storm water associated with construction and construction support activities, and
5 requires that persons engaged in “construction activities, including, but not limited
6 to, clearing, grading, excavation, and construction activities that result in the
7 disturbance of one acre or more of total land area” obtain coverage under a NPDES
8 permit for their stormwater discharges. HAR Ch. 11-55, Appendix C, Section 1.1
9 (NPDES General Permit Authorizing Discharges of Storm Water Associated with
10 Construction Activity, hereafter “Hawai‘i General Storm Water Permit”).

11 28. The Hawai‘i General Storm Water Permit also covers activities that disturb
12 less than one acre of total land area that is part of a larger common plan of
13 development or sale” if the larger common plan will ultimately disturb one acre or
14 more of total land area. HAR Ch. 11-55, Appendix C, Section 1.1.

15 29. “Disturbance of land” refers to the penetration, turning, or moving of soil or
16 resurfacing of pavement with exposure of the base course or the exposure of bare
17 soil or ground surface, including the land surface exposed by construction roads,
18 baseyards, staging areas, demolition, headquarters, and parking areas. HAR Ch.
19 11-55, Appendix C, Section 1.4. It also includes “grubbing,” meaning the use of
20 equipment to knock down and push vegetation out of the way, typically uprooting

1 vegetation and disturbing the ground surface. *Id.*

2 30. As an alternative or in addition to coverage under the Hawai‘i General
3 Storm Water Permit Authorizing Discharge of Pollutants Associated with
4 Construction Activities, the Department of Health may require any permittee to
5 apply for coverage under an individual permit. HAR Ch. 11-55, Appendix C,
6 Section 2.3.

7 31. On December 6, 2013, the Department of Health, Clean Water Branch
8 readopted the Hawai‘i General Storm Water Permit Authorizing Discharge of
9 Pollutants Associated with Construction Activities; it is valid for a period of five
10 years.

11 32. At least 180 days prior to beginning construction activities that disturb one
12 or more acre of land (or less than one acre of total land area that is part of a larger
13 common plan of development), a discharger must submit a complete and accurate
14 Notice of Intent (“NOI”) to be covered by the Hawai‘i General Storm Water
15 Permit Authorizing Discharge of Pollutants Associated with Construction
16 Activities. HAR Ch. 11-55-04(1). A discharger must also develop and comply
17 with a Stormwater Pollution Prevention Plan. HAR Ch. 11-55, Appendix C,
18 Sections 7-8.

19 33. Section 505 of the CWA, 33 U.S.C. § 1365(a)(1), provides that citizens may
20 commence a citizen suit against “any person...who is alleged to be in violation

of...an effluent standard or limitation under this chapter[.]”

FACTS

34. Hawai‘i Dairy Farms, LLC is in the process of constructing, and plans to operate, a commercial dairy at the Proposed Dairy Site in Māhā‘ulepu, Kaua‘i. Hawai‘i Dairy Farms will initially house at least 699 cows at the Site, scaling its operations up to 2,000 cows within a short time thereafter.

35. The Proposed Dairy Site is on approximately 578 acres of land being leased from Defendant Māhā‘ulepu Farm, LLC, to Defendant Hawai‘i Dairy Farms, LLC.

36. Upon information and belief, Hawai‘i Dairy Farms and the other Defendants have engaged and continue to engage in construction and construction support activities at the Proposed Dairy Site, including, but not limited to: removal of Guinea grass and other “grubbing” activities to make the ground suitable for planting of non-native Kikuyu grass; installation of irrigation systems and associated piping, some of which may be underground; construction and in-ground installation of concrete watering troughs, including associated piping; digging of an effluent pond to store manure generated by the dairy herd; installation of monitoring wells; road improvements; and the staging of materials and equipment to accomplish the above and other activities (hereinafter “Construction Activities”).

37. Upon information and belief, Hawai‘i Dairy Farms and the other Defendants

1 began these construction activities sometime in early 2014 (at minimum, prior to
2 August, 2014 and potentially as early as January, 2014).

3 38. Upon information and belief, Hawai'i Dairy Farms submitted a "Notice of
4 Intent" or NOI to the Department of Health on or about September 9, 2014,
5 seeking coverage under Hawai'i's General Storm Water Permit Authorizing
6 Discharge of Pollutants Associated with Construction Activities. That NOI and
7 any corresponding application were not approved by the Department of Health,
8 and no permit was issued.

9 39. Upon information and belief, Hawai'i Dairy Farms re-applied for coverage
10 under the General Storm Water Permit on or about May 7, 2015. As of the date of
11 the filing of this complaint, Hawai'i Dairy Farms' May 7 application has not been
12 approved.

13 40. Upon information and belief, Hawai'i Dairy Farms has not secured coverage
14 under the Hawai'i General Storm Water Permit Authorizing Discharge of
15 Pollutants Associated with Construction Activities or under an applicable
16 individual permit authorizing discharges associated with its construction activities.

17 41. Upon information and belief, Hawai'i Dairy Farms has engaged and
18 continues to engage in Construction Activities at the Proposed Dairy Site.

19 42. The Department of Health stated in a May 6, 2015 "Responsive Pretrial
20 Statement" in a state court matter that Hawai'i Dairy Farms "has begun grading

1 and grubbing activities related to the construction of the dairy.” Specific dates,
2 times, and locations of construction activities and expected pollutants associated
3 with those activities are, or should be, in possession of the Defendants. Pollutants
4 may include, but not be limited to dirt, debris, sewage sludge from land
5 applications, biological materials, rock, sand, or other materials.

6 43. The Proposed Dairy Site is uncovered, and therefore exposed to
7 precipitation.

8 44. Upon information and belief, Defendants have discharged, are discharging,
9 and will continue to discharge unpermitted stormwater runoff, containing
10 Construction Pollutants, into waters of the United States.

11 45. Upon information and belief, the sources of pollutants associated with the
12 construction activities at the Proposed Dairy Site include, but are not limited to,
13 roadways, raceways, concrete troughs, concrete and compacted limestone
14 platforms for troughs, irrigation pipe installation, wells, and other items, machinery
15 and construction materials stored on the Site, any vehicles driving on and off the
16 Site, and others.

17 46. Upon information and belief, the Construction Pollutants present in
18 stormwater discharged from the facility include, but are not limited to, dirt, debris,
19 sewage sludge from land applications, biological materials, rock, sand, or other
20 materials. These pollutants alter and degrade water quality, including such

1 parameters as turbidity, biochemical oxygen demand and pH.

2 47. Upon information and belief, stormwater runoff from the Proposed Dairy
3 Site has been and continues to be conveyed to navigable waters by gravity via site
4 grading, slopes, and existing infrastructure, including through a series of ancient
5 agricultural ditches located on the Māhā‘ulepu site (the “Māhā‘ulepu Ditches”),
6 which eventually converge into the Wai‘opili Stream. The Wai‘opili Stream flows
7 south and away from the Proposed Dairy Site, entering the Pacific Ocean just a
8 short distance away, near the Makauwahi Cave Reserve and Gillin’s Beach.

9 48. Hawai‘i Dairy Farms is aware that site-disturbing activities have caused and
10 will continue to cause the discharge of pollutants as storm water to nearby surface
11 waters. In its unapproved “Storm Water Prevention Plan,” Defendant Hawai‘i
12 Dairy Farms admits that its construction activities will discharge at least 5.74 cubic
13 feet per second into receiving waters during a 2-year, 1-hour precipitation event.

14 49. Water quality in the Wai‘opili Stream exceeds applicable water quality
15 standards. For example, water quality tests conducted at various locations in the
16 Wai‘opili Stream over the past year have shown levels of enterococcus well in
17 excess of the State’s water quality standards of 35 colonies forming units
18 (geometric mean) and 130 colonies forming units (statistical threshold value) per
19 one hundred milliliters. In 2015, the average concentration of enterococcus has
20 been approximately 14,000 colonies forming units per one hundred milliliters.

1 Recent tests have also shown high levels of turbidity.

2 50. The Māhā‘ulepu Ditches, the Wai‘opili Stream, and the Pacific Ocean are all
3 “waters of the United States” as defined by 40 C.F.R. 122.2.

4 51. Upon information and belief, stormwater runoff from the Proposed Dairy
5 Site is not treated to remove any pollutants before discharging into waters of the
6 United States.

7 **CLAIMS FOR RELIEF**

8 **COUNT I**

9 **Unauthorized Discharge of Construction Pollutants into**
10 **Waters of the United States**

11 52. Friends of Māhā‘ulepu incorporates the allegations contained in the above
12 paragraphs as though fully set forth herein.

13 53. Section 301 of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of
14 pollutants unless pursuant to the terms of a valid NPDES permit issued pursuant to
15 Section 402 of the CWA, 33 U.S.C. § 1342.

16 54. The Māhā‘ulepu Ditches, the Wai‘opili Stream, and the Pacific Ocean are all
17 “waters of the United States” subject to the CWA.

18 55. Defendants did not and do not retain a NPDES permit authorizing their
19 storm water discharges into such waterways from construction activity at the
20 Proposed Dairy Site.

1 56. Since sometime prior to August, 2014, Defendants have discharged
2 Construction Pollutants associated with their construction activities at the Proposed
3 Dairy Site into waters of the United States, continue to discharge such pollutants
4 and are likely to continue to do so in the future with each subsequent precipitation
5 event.

6 57. Each day that Defendants have discharged since the inception of ground
7 disturbing activities and continue to discharge constitutes a separate and distinct
8 violation of the CWA.

9 **COUNT II**

10 **Failure to Obtain Permit Coverage for Storm Water Discharges**

11 58. Friends of Māhā'ulepu incorporates the allegations contained in the above
12 paragraphs as though fully set forth herein.

13 59. Defendants are required to obtain permit coverage for construction activities
14 at the Proposed Dairy Site under the Hawai'i General Storm Water Permit or an
15 applicable individual NPDES permit pursuant to Section 402 of the Clean Water
16 Act, 33 U.S.C. § 1342.

17 60. As of the date of the filing of this complaint, Defendants have secured no
18 such permit coverage for the construction activities at the Proposed Dairy Site.
19
20

61. Each and every day on which Defendants have not had permit coverage for the length of time that construction activities at the Proposed Dairy Site have taken place constitutes a separate and distinct violation of the CWA.

RELIEF REQUESTED

WHEREFORE, Friends of Māhā‘ulepu respectfully requests that the Court enter a judgment:

A. Declaring that Defendants have violated and continue to be in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for the unlawful discharges of pollutants stemming from unpermitted construction activities to waters of the United States;

B. Declaring that Defendants’ have violated and continue to be in violation of Section 402 of the Clean Water Act, 33 U.S.C. § 1342, for their failure to obtain coverage under the Hawai‘i General Storm Water Permit Authorizing Discharge of Pollutants Associated with Construction Activity or an applicable individual permit for their discharges of polluted storm water associated with construction activities at the Proposed Dairy Site;

C. Enjoining Defendants from discharging storm water containing construction related pollutants from the Proposed Dairy Site into waters of the United States except as authorized by and in compliance with the Hawai‘i’s General Storm

1 Water Permit Authorizing Discharge of Pollutants Associated with Construction
2 Activity or an applicable individual permit;

3 D. Ordering Defendants to comply fully and immediately with all applicable
4 requirements of the Hawai‘i General Storm Water Permit Authorizing Discharge
5 of Pollutants Associated with Construction Activity;

6 E. Ordering Defendants to pay civil penalties of \$37,500 per day, per violation,
7 for all violations of the Clean Water Act at the Proposed Dairy Site, pursuant to
8 Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d), 1365(a), and 40
9 C.F.R. §§19.1-19.4;

10 F. Ordering Defendants to remediate any harm caused by Defendants’
11 noncompliance with the Clean Water Act and to eliminate any potential for future
12 harm;

13 G. Ordering Defendants to pay Plaintiff’s reasonable attorneys’ fees, expert
14 witness fees, and costs incurred in prosecuting this action pursuant to 33 U.S.C. §
15 1365(d); and

16 H. Awarding any such other relief as the Court may deem just and proper.

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18 ///

19 ///

20 ///

1 Dated: June 1, 2015.

2 Respectfully Submitted,

3 /s/ Charles M. Tebbutt

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forthcoming

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